BRIEF IN SUPPORT OF PETITION

POINT I

We submit that it is not the law in New Jersey or anywhere else that common carriers, by their own general use of a given device, can conclusively set their own standard of care, or that, in the absence of proof that there is such a device in general use, "the carrier may provide what it thinks best" and thereby conclude both court and jury.

Such holding, we submit, violates all the principles of public policy which have guided the courts in the exposition of the standards of care and foresight required of common carriers. It substitutes for the usual requirement of the highest degree of care the lowest conceivable minimum, to wit, what common carriers may generally choose to provide or, if there be no proof of that, then whatever the individual carrier may choose to provide.

The opinion of the Circuit Court of Appeals is reported in 113 Fed. (2d) 649:

We had assumed, until this decision was made, that all American courts, unless otherwise compelled by statute, recognized the law as thus stated in *Alabama Great Southern R. Co.* v. *Alsup,* 101 F. (2d) 175:

> "It is well settled that a railroad, while not an absolute insurer, owes the highest duty to provide for the safety of its passengers, including safe means of leaving the train."

Certainly also we had assumed that such indisputably was the New Jersey law, since in *Holda* v. *Public Service*

Coordinated Transport, 11 N. J. Misc. 879, where a passenger in a motor bus was injured by a suitcase, the court said:

> "The defendant company being a common carrier of passengers was bound to use a high degree of care to protect the plaintiff from danger that foresight could anticipate."

Indeed, we would have assumed that the New Jersey decisions in *Rapp* v. *Butler-Newark Bus Line, Inc.*, 103 N. J. L. 512, and *Mumma* v. *Easton & A. R. Co.*, 73 N. J. L. 653 (more fully discussed hereafter) would have justified application of the doctrine *res ipsa loquitur*.

But the trial court, in charging the jury, did not go so far. It accepted the somewhat lower standard suggested in the defendant's own third request to charge (858), to wit, "what might reasonably have been foreseen before the alleged incident." It left to the jury to say whether in view of the construction of the rack and (to use the language of the Circuit Court of Appeals) the inevitable "swerving and twisting" of the bus in operation, the falling of heavy baggage placed in such a rack "might reasonably have been foreseen" "or should have been reasonably anticipated" by a "reasonably prudent person."

Compare with this very mild (—too mild, perhaps—) requirement as to the standard of care and foresight charged by the trial court with the Circuit Court of Appeals' complete nullification of the whole doctrine of reasonable anticipation, foreseeability and common prudence, and its substitution of the startling doctrine that, in the absence of proof of the general use of some particular device, "the carrier apparently may provide what it thinks best."

The decision of the Circuit Court of Appeals amounts to a holding that in New Jersey the obligations of a common carrier are, in effect, in accordance with such minimum standard as they may care to set for themselves, or,

if they have not set any such standard for themselves, then such minimum standard as the individual carrier may set for itself.

In New Jersey thousands of persons are transported daily by interstate common carriers. Can it be that their only protection is what the common carrier "thinks best" to "provide"?

POINT II

The Circuit Court of Appeals has misread the New Jersey decisions, and its opinion is in conflict therewith and in conflict with the law as laid down in the Federal courts and as universally declared.

The New Jersey cases by which the Circuit Court of Appeals felt pushed into so extreme a ruling are:

Traphagen v. *Erie R. R.*, 73 N. J. L. 759;
Feil v. *West Jersey & Seashore Railroad Co.*, 77 N. J. L. 502;
Kingsley v. *Delaware, Lackawanna & Western R. R. Co.*, 81 N. J. L. 536;
Leech v. *Hudson & Manhattan Ry.* Co., 113 N. J. L. 366, affirmed on the opinion below, 115 N. J. L. 114;
Byron v. *Public Service Coordinated Transport*, 122 N. J. L. 451;
Hansbury v. *Hudson & Manhattan Ry. Co.*, 13 Atl. Rep. (2) 216. (124 NJL 502,

In the first place, there is no factual parallel between those cases and the present case. In all those cases the direct cause of the accident was the passenger's own act, such as stepping down a step on a platform or a car or

stepping between a step and a platform. The plaintiff's claim in those cases was that the step or platform was not so constructed as adequately to guard the passenger against such action by himself. The courts merely held that where such construction was not obviously dangerous in itself and (in the language of the *Traphagen* case, p. 761) could not be said not to "afford reasonable means for alighting" or not to show the "use of careful judgment in the method of construction", the plaintiff could not recover merely by asking the jury to find that the common carrier was bound to provide some other method of construction, particularly in the absence of proof that other accidents had previously occurred in the same manner.

Here the factual situation was altogether different. No act of the plaintiff contributed to her own injury. The object which fell was not hers and had not been placed in the rack by her. She was merely occupying a seat to which she had been invited by the defendant and for which she had paid. The bus was not standing still at the time. The jury found that the brief case had not been "placed improperly by its owner."

We adopt the description of the accident as given by the Circuit Court of Appeals itself:

> "She boarded the bus at Union City, New Jersey, and sat down in the second seat on the right-hand side of the aisle; a fellow passenger was beside her, nearer the window. Shortly after she was seated, he arose from his seat and put a brief case, which he had been holding in his lap, in the baggage rack overhead. After the bus had gone about a mile, this fell down and struck the plaintiff on the right side of her head, causing the injuries for which she sued. The bus had been swerving and twisting so violently that the plaintiff had been several times thrown against her fellow passenger; and a jury might properly have found that this caused the brief case to fall."

The testimony of the defendant's own witness, William Barbour, who was a student driver on the bus at the time (707), is that the accident happened shortly "after we made the hairpin turn coming off the east boulevard" (708). To the same effect is the testimony of the defendant's witness Barry, driver of the bus, "—you are always turning corners" (680-684).

The jury would readily know that this swerving, twisting, swaying and joggling by the bus was a foreseeable if not a normal consequence of its operation in the metropolitan area. Frequent stops, more or less sudden, are rendered inevitable by traffic lights, pedestrians and other vehicles, and by the need of taking on and letting off passengers. There were certain to be sudden turns and changes in speed and direction.

Such forceful movements by the bus were clearly foreseeable by its owner and operator. Hence it was a clear question for the jury whether or not a rack of this particular character was reasonably adequate to prevent the falling of the miscellaneous objects, varying in size, shape and weight, which by the tender of the rack the defendant invited its passengers to place upon it over the heads of other passengers, and whether or not because of the character of this rack such falling was reasonably foreseeable by a prudent operator.

There was no evidence that the object which fell was not of a character or class which would normally be placed upon the rack; and the very happening of the accident showed that under the conditions of bus operation such an object could fall through bars so widely placed or over an edge so unguarded.

It is one thing when an accident is brought on by the passenger's own action, and the sole question is whether the carrier should have done more than it did to prevent such action by the passenger himself.

It is an altogether different thing when the passenger, passively sitting in a place designated by the carrier in

its own conveyance, is hit by an object which fell from a rack where the carrier invites all passengers to put baggage and which ordinarily would not have fallen if due care had been used in making the rack safe for the purpose.

The dangers of such falls are obvious and are created or made possible solely by the carrier's own act. Whether the carrier has, under such circumstances, taken due care to protect against such foreseeable dangers is a question of fact for a jury.

All that the above New Jersey decisions hold is summed up in the latest one cited by the Circuit Court of Appeals, to wit, *Hansbury* v. *Hudson & M. Ry. Co.*, 124 N. J. L. 502, 13 Atl. (2d) 216 (1940). There the alighting passenger stepped into a space between the standing car and the platform. The Court affirmed the non-suit, saying:

> "There being no evidence of any negligence in the construction of either the car or the platform, it is evident that it violated no duty owed to the plaintiff. * * * The fact that a space existed between the car of the defendant's train and the station platform was no evidence of negligence, in the absence of proof of improper construction of either the platform or the car."

But such cases have no bearing at all upon a situation where a carrier invites a passenger to sit in a seat under a rack upon which it invites other passengers to place heavy objects and over which it has the right and duty of control. In such a case the carrier by its own affirmative action places upon itself an affirmative duty to use "the highest" or "a high" (or at least "a reasonable") degree of care to prevent the foreseeable ways by which the obvious dangers which it itself has thus created through the placing of overhanging objects may result in injuries to its passengers.

The rule invariably applied to such a situation by the Courts of New Jersey is thus stated in *Rapp* v. *Butler-*

Newark Bus Line, Inc., 103 N. J. L. 512, 138 Atl. 377, on the authority of *Mumma* v. *Easton & A. R. Co.*, 73 N. J. L. 653, 65 Atl. 208:

> "When through any instrumentality or agency under the management or control of a defendant or his servants there is an occurrence, injurious to the plaintiff, which, in the ordinary course of things, would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care."

In this *Rapp* case the injuries to the plaintiff passenger were the result of the coming loose of the right rear wheel of the bus from the axle to which it had been attached, thus permitting the axle to go through the side of the bus and strike the plaintiff. The Supreme Court of New Jersey unanimously affirmed a judgment for the plaintiff saying (in addition to quoting the above from the *Mumma* case):

> "It is a matter of common knowledge that a jitney bus, when run with due care and kept in proper condition, will carry its passengers safely; and, when the plaintiff, being a passenger, has proved the reception of injuries through the happening of an accident which would not have occurred except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injuries were caused without his fault. *Bergen County Traction Co.* v. *Demarest*, 62 N. J. Law 755, 758, 42 A. 7279, 72 Am. St. Rep. 685."

A unanimous decision by the New Jersey Court of Errors and Appeals directly in point is *Gore* v. *D. L. & W. RR. Co.*, 89 N. J. L. 224. There the defendant's train was stopped at such a place that when the plaintiff alighted she did not step down on the station platform but on a roadway paved with rough Belgian blocks. As a result she

tripped and fell. In reversing a judgment of nonsuit the Court of Errors and Appeals said (p. 226):

> "This, it seems to us, is the situation presented by the plaintiff's testimony from which a jury might infer an invitation to leave the train under conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom."

This principle is directly applicable to the present case. Here the defendant invited the plaintiff to sit under this rack and impliedly assured her that she could safely do so. The defendant also invited other passengers to place their baggage and bundles on the rack. Thereby the defendant itself created and set in motion (to quote the *Gore* case) a chain of "conditions that placed upon the defendant the duty of using such care as arose out of such conditions and was commensurate with the danger to be reasonably apprehended therefrom".

We believe that it was on this decision that the Trial Court based its instruction to the jury. Certainly that decision represents the universally understood rule where conditions of danger to its passengers are set in motion or created by the acts of the carrier itself.

In *Hansen* v. *North Jersey St. Rwy Co.*, 64 N. J. L. 686, 46 Atl. 718, the Court of Errors and Appeals of New Jersey considered a case where the plaintiff was injured by reason of over-crowding on a trolley car about the point of exit. The Court held that since the conditions about the point of exit were under the carrier's control, the carrier was bound by the following rules thus stated in the headnotes in the Atlantic Reporter:

> "1. A common carrier of passengers must use a high degree of care to protect them from dangers that foresight can anticipate.

2. By 'foresight' is meant, not fore-knowledge absolute, nor that exactly such an accident as has happened was expected or apprehended, but, rather, that the characteristics of the accident are such that it can be classified among events that without due care are likely to occur, and that due care would prevent.

3. The crowding of a trolley car, and especially of those parts of it that are used for entrance and exit, is attended with a liability to danger that the carrier should anticipate and employ care to avert."

In *Barney* v. *Hudson & M. R. Co.*, 145 Atl. 5, at page 6, (105 NJL 274,
the Court said:

"Now, the rule is that when a passenger in the charge of a common carrier shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by a high degree of care, then the jury have the right to infer negligence attributable to the carrier, unless the carrier proves that due care was exercised. Whalen *v.* Consolidated Traction Co., 61 N. J. Law, 606, 40 A. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723; McPherson *v.* Hudson, etc., R. Co., 101 N. J. Law, 410, 128 A 231."

In *Scott* v. *Bergen County Traction Co.*, 63 N. J. L. 407, 43 Atl. 1060, affirmed on opinion below, 48 Atl. 1118, the Court said:

"The railroad company was a common carrier of passengers, and as such it and its employees owe to the passengers a high degree of care for the safety of the passengers, and they are bound to exercise a high degree of care to get them safely to the journey's end."

In *Wall* v. *G. R. Wood, Inc.*, 119 N. J. L. 442, 197 Atl. 41, the Court of Errors and Appeals of New Jersey said:

"The care due from a common carrier and its servants toward passengers in their charge is a high

degree of care. *Whalen* v. *Consolidated Traction Co.*, 61 N. J. L. 606, 40 Atl. 645."

A leading case in another jurisdiction directly applicable is *Rosenthal* v. *N. Y., N. H. & H. R. R. Co.*, 88 Conn. 65. There the plaintiff was playing cards while seated in the smoking car of a train running from New York to Hartford and was *injured by a suitcase falling from the rack above his seat.* The Court held that the doctrine of *res ipsa loquitur* governed the situation and stated:

> "The furnishing of racks for that purpose *invites* passengers to use them to the extent of their apparent limit of safety, and imposes on the railroad, when the racks are so used, the duty of operating its trains so as not to endanger passengers sitting in the seats underneath such racks."

In New York the leading case is *Bressler* v. *N. Y. Rapid Transit Corp.*, 277 N. Y. 200. There the plaintiff was a passenger in one of the defendant's subway trains. During the running of the train and while she was sitting quietly in her seat, a pane of glass broke or shattered destroying her sight in one eye. The Court of Appeals held that these facts alone and in themselves made out a *prima facie* case of negligence.

Hence, as we have already pointed out, the charge of the trial court to the jury was actually much more favorable to the defendant than it was entitled to, because it did not hold the defendant to the doctrine of *res ipsa loquitur,* or even to "the highest" or even "a high" degree of care, but rather adopted the request of the defendant itself for an instruction that its obligation was merely "what might reasonably have been foreseen."

POINT III

The decision of the Circuit Court of Appeals was contrary to the settled rule in the Federal courts.

The Federal rule is the familiar type thus stated in *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 175 (C. C. A. 9th Ct.):

> "As a common carrier of passengers, respondent is charged with the utmost skill, care and diligence consistent with its business."

In *Alabama Great Southern Railroad Co.* v. *Alsup*, 101 F. (2d) 175 (C. C. A. 5th Ct.) the Court said (p. 176):

> "It is well settled that a railroad, while not an absolute insurer, owes the highest duty to provide for the safety of its passengers."

In *Shoemaker* v. *Kingsbury*, 79 U. S. 369, this Court thus defined the standards of care which common carriers owe to their passengers (p. 376):

> "The latter (the common carriers) undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travellers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable."

Spokane & Inland Empire R. R. Co., 241 U. S. 344, involved a question as to whether openings in the buffers in certain railroad cars were safe and properly constructed. In holding that this question was one properly for the determination of the jury, the United States Supreme Court said (p. 351):

> "We think the court was clearly right in holding that the question was not one for experts and that the jury after hearing the testimony and inspecting the openings were competent to determine the issue."

CONCLUSION

For the foregoing reasons we respectfully submit that a writ of certiorari should be granted.

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Respectfully submitted,

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